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ARMS AND CONSTITUTIONAL DESIGN: AN ESSAY FOR LAURENCE TRIBE

Sanford Levinson*

I was very pleased when I was told that Larry Tribe had requested the organizers of this splendid event to include me in its list of invitees. Even if I did not have some special feelings for the Tulsa Law School because of their kindness in honoring me several years ago, I would certainly have jumped at the opportunity to join in honoring someone who has truly been an exceptional presence in the community of American constitutional scholars over the past third of a century. Yet I wonder if he will be entirely pleased with the aspect of his work that triggers my own remarks today.

When I was the fortunate honoree, my friend Paul Finkelman, who had organized the event, was predictably lavish in his praise of my work. What I noticed, though, is that he omitted any mention of what is almost certainly my best known article—and, indeed, I have been told, the most widely reprinted article in the history of the Yale Law Journal—*The Embarrassing Second Amendment*.¹ I had the distinct feeling that he viewed it the way one might view some other highly regrettable indiscretion, and that courtesy, especially on such an occasion, dictated not even mentioning the topic. I hope that Professor Tribe will not be perturbed if I use my own allotted time to discuss what, not only to Paul, is indeed the embarrassing topic of the constitutional status of firearms.

There are two different ways we might approach this topic. One, of course, involves the Second Amendment that exists, for better or worse, in our own Constitution. Another is through the perspective of constitutional design. That is, whatever one believes that the Amendment means in the context of the United States Constitution, it is a completely independent question what one might advise contemporary drafters of constitutions with regard to the issue of firearms. My primary interest in this essay involves the latter issue of constitutional design, though one cannot entirely escape the particular history of our own Second Amendment.

This choice of topic is, of course, not entirely arbitrary. The *New York Times*, for very good reason, devoted a full page several years ago in its *Sunday News of the Week in Review* to the fact that, in what sadly we know now is the final edition of his monumental treatise on American constitutional law, Professor Tribe had announced his

* W. St. John Garwood and W. St. John Garwood, Jr. Centennial Chair in Law, University of Texas Law School; Professor of Government, University of Texas at Austin. As on my two previous visits to the Tulsa Law School, I am grateful for the opportunity given me to participate in a fine symposium and for the hospitality shown by members of the Tulsa Law Review.

1. Sanford Levinson, *The Embarrassing Second Amendment*, 99 Yale L.J. 637 (1989).

support for at least some version of what has come to be called the “individual rights” view of the Second Amendment.² His earlier edition had reduced the discussion of the Amendment to a footnote, where he wrote that the history of the Amendment “indicate[s] that the central concern of [its] framers was to prevent such federal interferences with the state militia as would permit the establishment of a standing national army and the consequent destruction of local autonomy.”³ As I shall argue below, this is no small point, even if it functions in the contemporary American discourse to limit the impact of the Amendment. He did note, however, that “the debates surrounding congressional approval of the second amendment do contain references to individual self-protection as well as to states’ rights,” though he went on to claim that the qualifying phrase “‘well regulated’ makes any invocation of the amendment as a restriction on state or local gun control measures extremely problematic.”⁴

The new edition takes a decidedly different tack: Professor Tribe now writes that the “central object” of the Second Amendment

is to arm “We the People” so that ordinary citizens can participate in the collective defense of their community and their state. . . . [T]he amendment achieves its central purpose by assuring that the federal government may not disarm individual citizens without some unusually strong justification. . . . That assurance in turn is provided through recognizing a right . . . on the part of individuals to possess and use firearms in defense of themselves and their homes.⁵

Given his iconic status as a self-conscious liberal, this was no small change of mind, as signified by the attention of the *New York Times* and much discussion afterward.

Not surprisingly, Judge Laurence Silberman, writing for the majority of the three-judge panel on the Court of Appeals for the District of Columbia, cited Professor Tribe’s “leading treatise on constitutional law” in its recent decision overturning the District’s quite draconian de facto ban on private firearms.⁶ The majority certainly did not view the Amendment as an “absolute” protection, but, like Professor Tribe, it agreed that the equivalent of an unusually strong justification is required before the citizenry can be functionally disarmed.⁷ According to the majority, no such justification was presented, and the D.C. ordinance was therefore illegitimate.⁸ I, too, was cited, though only for historical points and certainly not as the same kind of persuasive authority that Professor Tribe instantiates.⁹

I could easily fill up the remaining hour discussing Judge Silberman’s majority opinion and the dissent filed by Judge Henderson, including the unabashed “originalism” that underlay the majority’s decision. That is not my purpose today, however interesting

2. See William Glaberson, *Right to Bear Arms: A Second Look*, 149 N.Y. Times § 4, 3 (May 30, 1999).

3. Laurence H. Tribe, *American Constitutional Law* § 5-2, 299 n. 6 (2d ed., Foundation Press 1988).

4. *Id.*

5. Laurence H. Tribe, *American Constitutional Law* § 5-11, 901-02 n. 221 (3d ed., Foundation Press 2000).

6. See *Parker v. Dist. of Columbia*, 478 F.3d 370, 380 (D.C. Cir. 2007), cert. granted, *Dist. of Columbia v. Heller*, 128 S. Ct. 645 (2007).

7. *Parker*, 478 F.3d at 401.

8. *Id.*

9. See *id.* at nn. 7, 9.

such a discussion might be. Instead, as already suggested, I want to treat the issue of firearms as a problem not of constitutional *interpretation*—i.e., the meaning we assign to pre-existing constitutional texts—but, rather of constitutional *design*—i.e., deciding what to place in a constitution in the first place. As a matter of fact, I find that the latter question increasingly dominates my own teaching and scholarship.

My interest in constitutional design has become quite liberated from any interest I might retain in constitutional interpretation, not least because constitutional designers must worry most about what I have taken to calling “hard-wired” clauses that generate little, or no, litigation or, what may be much the same thing, create certain social and political “facts on the ground” that cannot easily, if at all be reversed. Equal votes in the Senate or the electoral college may be examples of the former; decisions as to the distribution of firearms within the social order may be the best example of the latter. Even if the issue is open to litigation, one must confront the undeniable reality of the role that guns play within any given society and realize that bans on firearms may become mere “parchment barriers”¹⁰ inasmuch as the populace in general will refuse to obey certain kinds of restrictive legislation even if it is determined to be constitutional.

In any event, the past sixty years have seen a spate of constitutions drafted all over the world, initially in response to the debacle of World War II in such countries as Germany and Japan, and later in the aftermath of the transition of many countries from one or another form of authoritarianism to the professed status of liberal democracy. The most recent example of constitutional design, of course, is that in Iraq, created of course with the participation, and many would say under the pressure, of American advisers. So the question I want to raise is what a well-designed constitution should say about firearms and, of course, why.

For a variety of reasons, the entire issue of constitutional design has been sadly neglected by the legal academy in favor of constitutional interpretation. One can understand this emphasis if the only goal of a law school is preparing its students to be competent constitutional litigators. But, of course, extremely few students, even at a school like Harvard, are going to end up litigating about constitutional semantics, unless it concerns the dormant commerce clause and other provisions that relate to American business. There are several different reasons for urging a turn to constitutional design. I believe strongly that the legal academy should pay more attention than has historically been the case to training our students to be knowledgeable and critical citizens, which requires paying more attention to our hard-wired Constitution and concomitantly less to how we interpret the relative tip of our constitutional iceberg that is actually litigated. It may be true, as Bob Woodward recently suggested at a panel at the University of Texas, that we conduct our politics under the Constitution we have rather, than the Constitution we would like to have, but that should not prevent us from studying, more than we do, the consequences for our polity of the specific Constitution we have.¹¹

10. James Madison, Alexander Hamilton & John Jay, *The Federalist* 321 (Random House 1937) (quoting *Federalist Paper No. 48*).

11. Bob Woodward, Remarks, *The Legacy of Watergate: Why It Still Matters* (U. of Tex. at Austin, Mar. 23, 2007) (audio recording available at the Harry Ransom Humanities Research Center at the U. of Tex. at Austin).

I have explored these themes in a recent book, *Our Undemocratic Constitution: Where the Constitution Goes Wrong (And How We the People Can Correct It)*, though I confess that I do not in fact discuss the Second Amendment.¹² The reason is that I do not in fact view it as so “hard-wired” as to preclude litigation. That does not, however, prevent me from emphasizing the issues raised by the Amendment today, in the context of what advice we might give contemporary constitution drafters, whether in the United States or elsewhere. Professor Tribe himself has advised other countries on what their constitutions should say, and I believe that he was the principal drafter of the Constitution of the Marshall Islands.¹³ Many American law professors have arrived at airports far away from the United States and been asked their advice as to what a new constitution should say. Most often, of course, such questions involve basic questions of electoral structure or the choice between presidential and parliamentary forms of government. But one should never underestimate the practical importance as well of confronting the difficult, often quite terrible, issues surrounding control of the means of violence.

Even if one is relatively uninterested in interpreting the Second Amendment, it is nonetheless worthwhile to address the question that accounted for my own initial interest in the Amendment: Just what explains the fact that it is in the Constitution at all? Why would those concerned about protecting “constitutional rights” have supported the Second Amendment? The one thing I am confident of is that it has literally nothing to do with protecting the rights of hunters. Indeed, it is almost frivolous to believe that those engaged in serious debate between 1787-1789 about the adequacy of the Constitution would have believed that the national government might be unsympathetic to hunters or that a constitutional amendment was necessary to protect them. As already suggested, some analysts believe that the original purpose of the Amendment was to protect an individual right of self-defense against potential criminals through the possession and use of firearms.¹⁴ Others emphasize instead a more communitarian notion of the Amendment, by which it acknowledges the possibility that an aroused citizenry, emulating the spirit of 1776, might choose to take up arms against a corrupt government in America, and that protecting the possession of firearms is a way of keeping all governments aware that there may be practical limits to what they can do vis-à-vis the citizenry. Thus Saul Cornell, in the most recent history of the Amendment, writes that:

The development of a states’ rights theory of the militia and the right to bear arms occurred slowly as opponents of nationalism struggled to define a constitutional theory that would provide the states with an effective check on federal power. Building on the civic conception of the right to bear arms, proponents of states’ rights argued that an armed citizenry organized as a well-regulated militia controlled by the states could take up arms against the federal government and thereby act as the final check against government tyranny.¹⁵

12. See Sanford Levinson, *Our Undemocratic Constitution: Where the Constitution Goes Wrong (And How We the People Can Correct It)* (Oxford U. Press 2006).

13. See Michael S. Serrill, *A Prophet’s Unlikely Defender*, 123 Time 34 (Jan. 23, 1986).

14. See Tribe, *supra* n. 5, at 895 n. 204.

15. Saul Cornell, *A Well-Regulated Militia: The Founding Fathers and the Origins of Gun Control in*

James Madison famously spoke of bills of rights as mere “parchment barriers” that could all too easily be breached by political rulers determined to achieve their own agendas.¹⁶ One might say the same, of course, of the reliance on Article I, Section 8, to set out the vaunted “limited government of assigned powers” that, according to Hamilton and other Federalists, made unnecessary the addition of a Bill of Rights to the Constitution in the first place. The great problem of constitutional design is to create self-enforcing mechanisms that guarantee, as much as possible, the maintenance of the basic ideals instantiated in a constitution. Few believe that relying on the good faith of those who take the reins of government is such a mechanism. The reason that we create elaborate institutions networks, captured in the notion of “checks and balances,” is precisely because we agree with Madison that men (and women) are indeed not angels and that governments must be designed in light of this fundamental reality.¹⁷

However regrettable it may be to concede the point, one powerful check-and-balance is the ability to take up arms. The potential of armed response perhaps has the same ability to concentrate one’s mind as does Dr. Johnson’s famous example of the prospect of being hanged in the morning: Consider only the likely consequence of the threats of the Pennsylvania and Virginia governors to call out the state militias and march on the new national capitol in Washington when it appeared that Federalists might succumb to the temptation, because of the fluke of a tie vote between Jefferson and his putative running-mate, Aaron Burr, to choose the New Yorker (and anti-slavery) Burr over the far more popular Jefferson.¹⁸ Perhaps Jefferson would have made it anyway, not least because Hamilton despised Burr and urged his adherents to give Jefferson the keys to the White House. But the possibility of de facto civil war, made altogether realistic by the existence of state militias, could also well have played a part.

One of the things that I find interesting about this latter example is that it underscores the importance even of what today is regarded as the “weak” view of the Second Amendment, which is that it protects only the right of a state to have a militia. Perhaps that right is not of much importance in the United States of 2007, but it was a remarkably important reality in 1801 and, I suggest, has much to tell us with regard to constitutional design in other countries even at present.

Perhaps I might summarize the foregoing comments as noting that there are what might be termed both “ideal”-theory and what might be called “exigent circumstances” defenses of the Amendment, at least at the end of the eighteenth century and, perhaps, even today. The first draws on political theory going back at least to Machiavelli and forward though James Harrington to the tradition we identify as civic republicanism. It emphasizes what Justice Breyer has recently labeled “active liberty,”¹⁹ which defines the good life as one that involves participation in one’s polity, including, of course, the all-

America 41 (Oxford U. Press 2006). I review Cornell in *Guns and the Constitution: A Complex Relationship* 36 *Revs. in Am. History* ____ (forthcoming Mar. 2008).

16. See Madison, *supra* n. 10, at 321.

17. See *id.* at 337 (referring to Federalist Paper No. 51).

18. See Bruce Ackerman, *The Failure of the Founding Fathers: Jefferson, Marshall, and the Risk of Presidential Democracy* 3 (Belknap Press 2005).

19. Stephen Breyer, *Active Liberty: Interpreting Our Democratic Constitution* 6 (Alfred A. Knopf 2005).

important task of monitoring ostensible leaders.²⁰ Although today we tend to think of such liberty in rather desiccated terms, those who led a revolution against what they perceived as a tyrannical British government had a considerably more robust notion of what constituted civil responsibility. They were the generation, after all, that found the symbol of the Minuteman an altogether real reminder of their own embrace of the most active conception of liberty that is possible. Of course one might argue, as many historians do, that the importance of citizen militias was highly overrated, that our mixture of professional soldiers and, lest we forget, the indispensable aid provided by France, won our independence—but for most Americans the ideology of civic republicanism easily triumphed over any contrary facts. If one shares the basic worldview of civic republicanism, then one might support a (certain kind of) right to bear arms as part of one's "ideal" political theory, at least so long as one makes certain assumptions about the potential of "leaders" to become corrupt and oppressive or the perception that even Arcadia may be menaced by outside enemies who must be defended against.

It may, however, be quite naïve to offer only ideological explanations of the Second Amendment. One must also point to the realities of "facts on the ground," including the existence of states—defined in terms both of institutional governments and their citizens who defined themselves at least significantly, if not indeed primarily, by reference to their states. Not surprisingly, both institutions and citizens were quite reluctant to give up all trappings of what even John Marshall, in *McCulloch v. Maryland*, would label their "sovereignty."²¹ One need not agree with such views. After all, there is good reason to believe that Madison was no friend of federalism at the Convention; there is even better reason, though, to believe that he, like his other anti-state colleagues in Philadelphia, realized that it would be necessary to compromise with devotees of states and their prerogatives in order to get a Constitution at all. If Paris was worth a mass, then successful achievement of what David Hendrickson has termed a "peace pact"²² among potentially antagonistic states was worth accepting such an abomination as equal voting power in the Senate and accepting the legitimacy of state militias. Even if such sheer political exigencies offer more by way of explanation than commitment to more "ideal" political theory, that may still have much to teach us when coming to terms with the practical reality of drafting constitutions in at least some countries in today's unhappy world.

So consider in this context the unhappy reality in Iraq. Perhaps the only issue on which the editors of the *New York Times* and the Bush Administration agree is the necessity that "private" militia groups disarm and accept what might be called the Weberian reality of the work-in-progress called the central Iraqi government as possessing a monopoly over the means of violence. Max Weber had defined as among "[t]he primary formal characteristics of the modern state" the fact that "to-day, the use of force is regarded as legitimate only so far as it is either permitted by the state or

20. *Id.* at 4.

21. 17 U.S. 316, 404 (1819).

22. See David C. Hendrickson, *Peace Pact: The Lost World of the American Founding* (U. Press of Kansas 2003).

prescribed by it. . . . The claim of the modern state to monopolize the use of force is as essential to it as its character of compulsory jurisdiction and continuous organization.”²³ Though Weber actually couches his statement in terms of the *legitimate* use of force, which obviously countenances the possibility that the state in fact does not possess a monopoly over all *actual* uses of force, Weber’s claim is often used to suggest that the state must also possess a monopoly over the actual implements of force, lest non-state possession of such implements indeed lead to the untoward consequences of its illegitimate use.²⁴ As I noted in my original article, it is just such a Weberian understanding of the state that gives power to the bumper sticker, “If guns are outlawed, only the government will have guns,” a far more profound piece of political theory than the more common and better-known sticker that emphasizes that “criminals will have guns.”²⁵

So I suggest that you ask yourself the following question: Imagine that you have agreed to advise *any* of the constituent groups within Iraq (as distinguished, for example, from providing advice to the Iraqi government itself). Would you possibly advise your clients to turn their firearms over to the representatives of that government in reliance on the good faith of representations that it will provide the kinds of protections that help to explain the existence of the militias in the first place? Indeed, even if one assumes the good faith of such representations, a mighty leap in itself, one must also assure one’s clients that the good faith can be actualized: i.e., not only will there be sufficient numbers of Iraqi security personnel to provide the requisite security, but they will also have been socialized into a proper sort of civic identity that will lead them to risk their lives in behalf of *any* Iraqi citizen and not only members of his or her (though, of course, one suspects that use of “her” here is truly misleading) ethnic or religious group. Would it not be consultancy malpractice to advise your clients to give up their firearms and, what is just as important, to dissolve the organized militias?

Indeed, to present the question in an even more pointed manner, would any sane person advise the Kurds to dissolve their *peshmurga*; would one not be infinitely more likely to support the Kurdish quest for a highly-federalized Iraq (which may or may not simply be a way-station toward an independent Kurdistan, which would bring with it the possibility of armed conflict with Turkey and Iran). And would not part of such federalism involve an Iraqi equivalent of a Second Amendment? That is, even if one were dubious about the “private” possession of armed weapons, an intermediate possibility between the completely privatized distribution of arms and centralized control by a national government is precisely to treat the constituent states within a federal system as authorized to have their own militias.

It may not be entirely surprising that the editors of the *New York Times* are insufficiently appreciative of any critique of the centralized control over the means of violence, inasmuch as they regularly support all “gun control” legislation and denounce members of the National Rifle Association who oppose such legislation. The Bush

23. Max Weber, *The Theory of Social and Economic Organization* 156 (Oxford U. Press 1947).

24. *See id.*

25. Levinson, *supra* n. 1, at 650.

Administration, however, should explain why it so strongly endorses a quite “strong” reading of the Second Amendment, one that goes considerably beyond the “state-militia” interpretation, at the same time it condemns militias in Iraq. Is the argument that Americans are more in need of firearms to protect themselves against a potentially untrustworthy national government than are Iraqis? On our worst days some of us may think such thoughts, but that is not really a serious argument. One could offer a similar response to the suggestion that Americans are more in need of firearms for self-defense against criminals with weapons than are Iraqis.

So the ultimate question is this. Does one actually *defend* the Second Amendment, or, at most, does one simply *tolerate* its presence in our own Constitution, even if one joins Laurence Tribe in offering a quite robust notion of what it means? In a recent column, Benjamin Wittes cited both Professor Tribe and myself for the proposition that the Amendment indeed has some genuine bite that serves to legitimate the decision of the D.C. Circuit Court; he immediately went on, though, to suggest that an attempt should be made to repeal the Amendment, since he apparently believes that it is indefensible.²⁶

Perhaps he is correct. I am, after all, no great fan of what I believe to be both an undemocratic and increasingly dysfunctional Constitution. But I do want to leave you with the possibility that the Second Amendment, for all of its costs, may have considerably more valuable lessons to teach the would-be constitutional designer than say, the United States Senate or the electoral college.

26. See Benjamin Wittes, *Ditch the Second Amendment*, New Republic (Mar. 19, 2007) (available at http://www.brookings.edu/opinions/2007/0319governance_wittes.aspx).